recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings."

The above statement of the law was approved by the Privy Council in *Abigail* v. *Lapin*[13] in which Lord Wright delivering the judgment of their Lordships said at page 500:

"The Real Property Act, 1900, of New South Wales, embodies what has been called, after the name of its originator, the Torrens system of registration of title to land. . . .it has long been held that equitable claims and interests in land are recognised under the Real Property Acts. . . .for the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as *cestui que* trust, or under any unregistered instrument or any other estate or interest;".

In the local case of *Wilkinson And Others* v. *Kannammal & Anor.*[14] it was held by the Court of Appeal that the Torrens system is a system of conveyancing and that it does not abrogate the principles of equity.

From what I have just said it follows that if the agreement in the present case is taken as a permit or licence to the appellants to enter the land and mine it, and in view of the fact that the appellants relying on that agreement entered into occupation of the land and spent large sums of money to commence mining operations, equity will protect their rights under the agreement and hold that the respondents are holding the land comprised in the mining lease in trust for the appellants to permit the appellants to mine it for the duration of the permit. Thus, the appellants were also entitled to lodge a caveat under section 323(1)(b) of the National Land Code.

Counsel for the respondent took the point that the second option was not as between the appellants and Chenderiang but between the shareholders of the appellant company and Chenderiang. I can find no substance in that point so long as it is clear that all shareholders of the appellant company joined in the option.

Another point taken is that it is not true that the two options were to operate simultaneously or that they were interlinked and that the appellants consented to the granting by the respondents of their option to Chenderiang, so that the appellants are not entitled to stand on their right under the agreement. It is next said that mining had stopped under the agreement even though the agreement was subsisting in point of time. In my judgment, all these matters are irrelevant for the purpose of this appeal, although they will be relevant in the event of any litigation between the parties either for the cancellation of the agreement or for its specific performance.

As I have already said, the respondents made their application for removal of the caveat under section 327 of the National Land Code. That section is similar to section 143 of the Land Transfer Act, 1952 in New Zealand. In the New Zealand case of *In re Peychers' Caveat*[15] it was held that the summary removal of a caveat under section 143 of the Statute is proper only where it is patently clear that there was no valid ground for the lodging of the caveat in the first place, or patently clear that the interest which in the first place justified the lodging of the caveat no longer exists. It was further held that if there is a reasonable question to argue, the court should not remove the caveat but permit the matter to be litigated, the onus of proof being on the person moving for the withdrawal of the caveat on the ground that the caveator had no beneficial interest to support his caveat.

In this connection it was submitted on behalf of the respondents that if the court is of the view that the caveat should be retained, then some sort of order should be made requiring the appellants to bring an action within a certain period. I do not think that this court has any power in these proceedings to make any such order. In my opinion such an order can only be made if an application is made to the registrar for the removal of a private caveat under section 326(1) of the National Land Code and the caveator is then obliged to make an application to the court for extension of the caveat. It was of course open to the respondents to have brought an action for the cancellation of the agreement and to have asked for a consequential order for the removal of the caveat, instead of which they took the summary procedure under section 327 of the National Land Code for the removal of the caveat.

To sum up, it would seem clear to me that on the basis of their agreement with the respondents the appellants had a caveatable interest both under section 323(1)(a) and 323(1)(b) of the National Land Code. I would therefore allow their appeal, set aside the order made by the court below and make a further order that the caveat, if it has been removed, be restored. I would also make an order that the respondents do pay the appellants' costs both here and in the court below.

Azmi L.P. and **Ong Hock Sim F.J.** concurred.

Appeal allowed.

Solicitors: *Cheang Lee & Ong; Lewis & Co.*

ABU BAKAR v. ORIENTAL FIRE & GENERAL INSURANCE CO. LTD.

[F.C. (Azmi L.P., Gill and Ong Hock Sim F.JJ.) March 2, 1974]

[Ipoh — Federal Court Civil Appeal No. 142 of 1972]

Insurance — Fire Insurance — Denial of liability on ground of non-disclosure — Insurance company not misled as to nature of insurance desired and in respect of what goods.

In this case the appellant had applied for insurance against fire and in answer to the question "For what purposes are the premises occupied" he gave the answer "Sundry shop downstairs, dwelling first floor". Fire broke out on the front of the ground floor causing considerable damage to goods in it. It appeared that there were four grinding mills for grinding curry powder at the back of the shop. The insurance company denied liability on the ground that the appellant had failed to disclose the presence of the flour mill at the rear portion of the shop.

The President of the Sessions Court and the High Court held that the respondents were not liable under the insurance policy. The appellant appealed.

Held, (Azmi L.P. and H. S. Ong F.J., Gill F.J. dissenting), allowing the appeal: in this case the respondents had not been misled as to the nature of the insurance the appellant wished to take and in respect of what goods, and there was no evidence to show in what way the presence of the grinding mills was considered to increase the risks with respect to the property insured and therefore, the respondents were liable under the insurance policy.

Per Azmi L.P.: "...if the fact even though material is one which the proposer did not and could not in particular circumstances, have been expected to know, or if its materiality could not have been apparent to a reasonable man, his failure to disclose should not be regarded as a breach of his duty."

Per Gill F.J.: "Once the truth of the answers has been made a condition of the policy it is not open to the court to consider the question whether the answers are material or not."

Cases referred to:-

(1) *Perrins* v. *Marine and General Travellers Insurance Society* 121 E.R. 122.

(2) *Bawden* v. *The London, Edinburgh and Glasgow Assurance Co.* [1892] 2 Q.B. 534.

(3) *M'Millan* v. *Accident Insurance Co. Ltd.* [1907] S.C. 484.

(4) *Newsholme Brothers* v. *Road Transport and General Insurance Co. Ltd.* [1929] All E.R. Rep. 442, 451.

(5) *Perrins* v. *The Marine and General Travellers Insurance Society* (1859) 2 E&E 317.

(6) *Stone* v. *Reliance Mutual Insurance Society Ltd.* [1972] 1 Lloyds Rep. 469.

(7) *Holdsworth* v. *Laucashire and Yorkshire Insurance Co.* (1907) 23 T.L.R. 521.

(8) *China Insurance Co. Ltd.* v. *Ngau Ah Kau* [1972] 1 M.L.J. 52.

(9) *Condogianis* v. *Guardian Assurance Co.* [1921] 2 A.C. 125 at p. 127.

FEDERAL COURT.

W. S. W. Davidson for the appellant.

H. R. Sankey for the respondents.

Azmi L.P.: I have had the advantage of reading the judgments of my brothers Gill and H. S. Ong. They have come to different conclusions but I am inclined to agree with that of my brother H. S. Ong.

As the facts of the case have been fully dealt with in the other two judgments I need only refer to certain facts which I think are necessary for the purpose of my judgment.

To the question in the proposal form:

"For what purposes are the premises occupied? (e.g. dwelling, shop, godown etc.) If variously tenanted, please state the trade or business carried therein.",

the plaintiff gave the following answer:

"Sundry shop downstairs, dwelling first floor."

In the list "Property to be insured" there is a reference to "Machinery and Utensils" but apparently it was not intended that such items would be insured under this policy because in the column headed "Amount to be insured" the space was marked with a dash.

Fire broke out in the front part of the ground floor causing considerable damage to goods in it. The goods effected and the furniture, fixtures and fittings there were insured for the sum of $17,000. It would appear from the facts of the case that there were all the time at the back of the ground floor of the premises 4 electrically operated grinding mills. These mills were used for grinding curry powders, coffee etc. and these mills were licensed by the Machinery Department and possessed certificates of fitness issued by the department. There was a signboard in front of the shop indicating that there were these grinding mills available for use of customers. The insurance company denied liability in these terms:

(a) Condition one of the policy of insurance was breached in that the plaintiff had misdescribed and misrepresented the purposes for which the premises were occupied.

(b) The plaintiff had failed to show the utmost good faith in the contract of insurance with the defendants.

In support of this defence, Mr. W. J. Morais, branch secretary of the insurance company, merely pointed out that a further rate of premium would be payable to cover the grinding mills. I quote his own words:

"Rate of premium for sundry shop is 30 cts for $100. This is shown on the proposal form. For a grinding mill is 75 cts per $100/-."

Mr. Nalliah, the agent of the defendant company was not called by either side to give evidence. But the President of the Sessions Court in reference to this man had made the following findings:

"From the evidence presented I also found as a fact that Mr. Nalliah must have known of the grinding machines; the evidence was too overwhelming for me to find otherwise. Also that he must have known of the different rates of premium stated earlier. I arrived at this finding from evidence of Mr. Nalliah's comparatively long association as agent of the defendant company. It is a well-known practice that in this country insurance agents do assist proposers to answer questions in an insurance proposal form, but having held that the plaintiff knew enough of the English language to read and understand what was written out by Mr. Nalliah the plaintiff should have known of the non-disclosure of the machines by Mr. Nalliah before he signed at the foot of the proposal. The proposal clearly misdescribed and misrepresented the purposes for which premises No. 61 Fair Park Road was occupied."

It is apparent from the evidence that these four mills were not insured under the policy and all that Mr. Morais could say was if they had been insured a higher rate of premium would be charged.

The president merely stated that the proposal form clearly misdescribed and misrepresented the purpose for which the said premises were occupied. He did not explain how the failure to mention the presence of the grinding mills amount to a misdescription or a misrepresentation. He finally, however, made this finding: —

"I found therefore that there had not been a full disclosure by the plaintiff of all the material circumstances affecting the fire policy and there consequently had not existed from its inception a contract of the utmost good faith — *uberrima fides*."

He apparently came to the conclusion that the presence of these mills are a material circumstance. He did not, however, say in what way it was material. The materiality of a particular fact subject to the proper direction as to the test to be applied, is a question of fact. It may nevertheless be necessary or advisable to have evidence of experts as to insurance practice, seeing that the test hinges on whether the representation is of such a nature as to influence the judgment of a prudent insurer, not on whether the representation influences the particular insurer looking at the proposal. Therefore as Whiteman J. in *Perrins* v. *Marine and General Travellers Insurance Society*(1) pointed out: —

"And as it has not been shewn to have been material, and as no fraud was involved in it, it was not such a conceal-

ment as can be held to be within the proviso of the policy. At most the plaintiff has not stated all that he might have stated. Had he stated even less, and left out the word 'Esquire' altogether, as my brother Hill suggested, I should still have said that he made no untrue averment."

I would further say that if the fact even though material is one which the proposer did not and could not in particular circumstances, have been expected to know, or if its materiality could not have been apparent to a reasonable man, his failure to disclose should not in my view be regarded as a breach of his duty.

I would allow the appeal with costs here and in the courts below. The cross appeal is dismissed. There will therefore be judgment in favour of the plaintiff in the sum of $3.144.19 and interest at 6% from 2nd August 1971.

Gill F.J.: The appellant, being the tenant of a double-storeyed shophouse at 61, Fair Park Road, Ipoh, carries on business in sundry goods in the front portion of the ground floor of the premises and runs a flour mill with four electrically operated grinding machines in the back portion. The top floor of the premises he uses as a dwelling for himself and his family.

With a view to having his stock-in-trade, business furniture, fixtures and fittings and personal effects in the premises insured against fire, he got in touch with one Mr. Nalliah, an agent employed by the respondent insurance company, whom he had known for fifteen years and who had come to his shop on many occasions to buy cigarettes and to have ragi ground into flour. Mr. Nalliah arrived at his shop on 20th July 1968 with a form headed "PROPOSAL FOR INSURANCE AGAINST FIRE", which he proceeded to fill in by writing down in the respective answer columns the answers given by the appellant to the questions set out therein. Question 3 in the form was as follows:

"For what purposes are the premises occupied? (e.g. dwelling, shop, godown, etc.). If variously tenanted please state the trades or businesses carried on therein."

As a result of what the appellant told him in answer to that question, Mr. Nalliah wrote down in the answer column the words "Sundry shop downstairs, dwelling first floor", there being no mention by the appellant of the flour mill and the grinding machines in answer to the question.

There was a declaration at the foot of the proposal form as follows:

"I hereby declare that the particulars of this proposal are true, and I agree that this proposal shall be the basis of the contract between myself and THE NATIONAL FIRE & GENERAL INSURANCE COMPANY LIMITED, and I am willing to accept a policy subject to the terms, clauses and conditions prescribed by the company therein."

The appellant completed the form by signing it just below the declaration clause. He later paid the premium for which he was given a receipt and subsequently Mr. Nalliah delivered to him the insurance policy being Policy No. 271171/68 for the period 20th July 1968 to 20th July 1969.

A year later a further premium was paid and the policy renewed by Policy No. 271378/69 for the period 20th July 1969 to 20th July 1970.

The policy provided that due observance and fulfilment of the terms, conditions and endorsements of the policy insofar as they relate to anything to be done or complied with by the insured shall be condition precedent to any liability of the company to make any payment under the policy. Clause 1 of the terms, conditions and endorsements of the policy reads as follows:

"If there be any material misdescription of any of the property hereby insured, or of any building or place in which such property is contained, or any misdescription as to any fact material to be known for estimating the risk, or any omission to state such fact, the company shall not be liable upon this policy so far as it relates to property affected by such misdescription, misrepresentation or omission."

On 10th May 1970 at about 8 p.m. a fire broke out in the front part of the ground floor of the premises resulting in the destruction of or damage to part of the appellant's stock-in-trade and furniture and fittings. The respondents having denied liability under the policy in respect of such damage on the ground that the appellant had failed to disclose in the proposal form that the premises affected by the fire were also used as a flour mill, the appellant brought an action against the respondents in the Sessions Court at Ipoh for the recovery of a sum of $5,083.88 as damages, or in the alternative for the return of the premium paid by him on the renewal of the policy.

The learned president found as a fact that Mr. Nalliah assisted the appellant by filling up the proposal form in his own handwriting, that he knew of the existence of the grinding machines and the materiality of such existence to the respondent company, but that he was an agent of the respondent company merely for the purposes of collecting the premium and handing over the receipts. He also found as a fact that the appellant knew enough of the English language to read and understand what was written by Mr. Nalliah so as to be aware of the non-disclosure about the grinding machines when he signed the proposal form. He therefore rejected the appellant's contention that Mr. Nalliah's knowledge of the grinding machines must be imputed to the respondents.

The learned president further found that the proposal clearly misdirected and misrepresented the purposes for which premises No. 61, Fair Park Road, was occupied. He therefore held that there had not been a full disclosure by the plaintiff of all the material circumstances affecting the fire policy and there consequently had not existed from its inception a contract of the utmost good faith — *uberrima fides*. As regards the materiality of the non-disclosure about the grinding machines, he relied on the evidence of the branch secretary of the defendant company to the effect that if the existence of the grinding machines on the ground floor of the premises had been disclosed in the proposal, the risk, if accepted by the company, would have attracted premium at the rate of 75 cents per hundred dollars and not 30 cents per hundred dollars.

As to the appellant's contention that the respondents were estopped from relying on the non-disclosure by reason of the fact that the respondents' agent had induced the appellant to pay the premium on the fire policy in the belief that the policy was valid and thereby

to act to his detriment, the learned president found that there was not an *iota* of evidence of any such inducement by Mr. Nalliah. He also rejected the appellant's contention that the respondents had waived the breach of the condition by the acceptance of the premium with knowledge of the said breach, on the ground that it was only during the period of the yearly extension of the fire policy that the respondents came to know of the presence of the machines from their insurance surveyor and not before. In the result, he dismissed the appellant's claim for damages with costs. He also dismissed the claim in the alternative on the ground that the appellant had not discharged the onus of proving how much he had actually paid by way of premium.

The appellant appealed to the High Court, his main ground of appeal being that in the light of his findings of fact the learned president should have held as a matter of law that the agent's knowledge should be imputed to the respondent company and that the respondents were in consequence debarred by waiver or alternatively by estoppel from relying on the appellant's non-disclosure. In support of this ground a number of cases were cited to Wan Hamzah J. who heard the appeal. The learned judge took the view that the facts of this case could be distinguished from the facts of the cases cited to him and that the present case must be decided on its own peculiar facts. The important aspect of this case, according to the learned judge's view, was the fact that Mr. Nalliah had filled up the proposal form from answers given verbally by the appellant and that admittedly the appellant himself did not verbally mention the flour mill and the machines.

The case of *Bawden* v. *The London, Edinburgh And Glasgow Assurance Co.*[2] was cited to him, but he felt disinclined to follow it, not because of any doubt as to the correctness of its decision expressed in *M'Millan* v. *Accident Insurance Co. Ltd.*[3] but because he considered it inapplicable to the facts of the present case. For this he found support in the following passage from the judgment of Scrutton L.J. in the case of *Newsholme Bros.* v. *Road Transport And General Insurance Co., Ltd.*: [4]

"In my view, the decision in *Bawden's* case is not applicable to a case where the agent himself, at the request of the proposer, fills up the answers in purported conformity with information supplied by the proposer. If the answers are untrue and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company."

Counsel for the appellant next submitted to the learned judge that the answer to question No. 3 as written in the proposal form was not an untrue answer but an incomplete one, so that on the authority of *Perrins* v. *The Marine And General Travellers' Insurance Society*[5] the respondents could not avoid the policy. The learned judge rejected that submission because, as stated by Wightman J., the concealment in that case had not been shown to have been material. His Lordship further pointed out that even if it was accepted that the written answer to question No. 3 was not an untrue answer but an incomplete answer, he did not see how the appellant could escape the consequences arising out of condition 1. In this connection he said:

"In my view in the written answer to question No. 3 there is an omission to state a fact material to be known for estimating the risk, namely, the fact of the existence of the grinding machines on the ground floor of the premises. In my view this fact is a fact material to be known for estimating the risk, because as found by the learned president, if the existence of the grinding machines on the ground floor of the premises had been disclosed, the risk would have attracted premium at the rate of 75 cents per $100 of the insured sum instead of 30 cents per $100 as was actually charged. Therefore in my view this omission to state this material fact in the answer to the question No. 3 is a breach of the condition 1. It does not appear that stipulations similar to the condition 1 in the present case were present in the policy in the *Perrins's* case (*supra*). Therefore I am of the view that the distinction made in the *Perrins's* case (*supra*) between an untrue answer and an incomplete answer is not a decisive factor in the present case.

In my view the facts of the present case are very near to those of the *Newsholme's* case (*supra*). In both cases it was not proved that the agent had been authorised by the insurance company to enter into any policy of insurance or to fill up proposal forms. In the *Newsholme's* case (*supra*) the proposal form contained a warranty that the answers were true and a statement that the warranty was promissory and should be the basis of the contract between insurers and insured."

The conclusion at which the learned trial judge arrived is stated in his judgment as follows:

"I hold that under the circumstances of this case Mr. Nalliah should be treated as agent for the plaintiff when filling in the proposal form. Notwithstanding the fact that he knew at that time that there were grinding machines on the premises, that knowledge cannot be imputed to the defendant company. Hence there was no waiver by the defendant company of condition 1 of the policy or of the right to insist on true particulars in the proposal form as the basis of the contract, and the defendant company is not estopped from relying on these. Therefore I hold that the defendant company is entitled to avoid the contract, but the plaintiff is entitled to recover any premium which has been proved to have been paid."

In the result, he dismissed the appellant's appeal against the dismissal of his action for damages. As regards the claim in the alternative, he found that the payment of $63.50 for the second premium had not been challenged. He therefore allowed the appeal to the extent that there be judgment for the appellant in the sum of $63.50 with costs of the appeal and in the court below. From that judgment of the learned appeal judge a further appeal has been brought to this court.

The arguments in support of the appeal before us were more or less the same as in the High Court. The main submission by counsel for the appellant, Mr. Davidson, is that *Newsholme's* case does not apply to a case of non-disclosure and that there is now a swing back to *Bawden's* case. In this connection, he cited to us the case of *Stone* v. *Reliance Mutual Insurance Society Ltd.*[6] about which there is a note by F. M. B. Reynolds in the *Law Quarterly Review (1972)* starting at page 462. It will be useful to set out the note in full. It reads:

"It is well known that proposal forms for insurance policies are often completed by an agent of the insurers and then handed to the proposer for signature. Not infrequently the proposer signs the form without reading it, and sometimes the form in fact contains inaccurate statements, because the agent has misunderstood or forgotten what was said to him or because he simply answered a question on the form without seeking information from the proposer. In *Newsholme Bros.* v. *Road Transport and General Insurance Co.* [1929] 2 K.B. 356, the Court of Appeal held, resolving a conflict of earlier authorities, that the company's agent was, in filling

in the form, acting as agent for the proposer: the company could therefore repudiate liability because of false statements in the proposal, though these statements had been inserted by its own agent contrary to the information supplied by the proposer. *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* [1892] 2 Q.B. 534, where an agent failed to note on the proposal form that the proposer lacked the sight of one eye, but his knowledge was nevertheless attributed to the company, was treated as exceptional and only doubtfully correct. The result of *Newsholme's* case is frequently reinforced by clauses in proposal forms to the same effect.

Though unexceptional from the point of view of legal reasoning, the decision undoubtedly does not accord with the expectations of many proposers: indeed the contrary result had already at the time been prescribed for certain forms of insurance by the Industrial Assurance Act 1923, section 20(4). *Stone* v. *Reliance Mutual Insurance Society Ltd.* [1972] 1 Lloyd's Rep. 469 offers some hope that it may be possible to reach a different decision in appropriate cases. In this case an agent of an insurance company wrongly filled in a proposal form for a fire and theft policy to the effect that the proposer had not previously held any insurance policy with the society and had not made any claims in respect of the risks proposed. In fact the proposer had held such a policy previously and had claimed on it: indeed, the reason for the agent's visit was to seek the revival of lapsed policies. Despite a clause in the proposal form to the effect that any person completing it did so as agent for the proposer and that the declaration was to be the basis of the contract, the insurer was not permitted to repudiate liability.

It seems that a crucial element in *Stone's* case was the fact that it was company policy that the agent should put the questions, writing down the answers (which was certainly not so in *Newsholme's* case). Although Megaw L.J. said that the appeal did not give rise to any question of a principle of law, and Stamp L.J. that it turned on its own special facts, the situation is probably a common one and it must, with respect, be important to determine exactly why this fact took the case out of the principle of *Newsholme's* case. This is unfortunately not clear. Lord Denning M.R. took the view that the agent had wrongly represented that the form was correctly filled in. Scrutton L.J. had suggested in *Newsholme's* case that this might give ground for rescission of the contract: but Lord Denning said: 'Nowadays an innocent misrepresentation may give rise to further or other relief,' and that it debarred reliance on the clause as to agency just as it debars reliance on an exemption clause (*Curtis* v. *Chemical Cleaning and Dyeing Co.* [1951] 1 K.B. 805). Megaw L.J. however seems to take the view that the agent made a mistake in a matter falling within his duty to the insurers (*cf. Ivamy*, General Principles of Insurance Law, 2nd ed., p. 497) and that therefore the company could not rely on the erroneous answers. Stamp L.J. added that the company could not therefore treat the non-disclosure as material. These reasons may well be subjected to close analysis in the future: in the meantime the result is to be welcomed."

In further support of his submission, Mr. Davidson relied on the following passage in the General Principles of Insurance Law by E. R. Hardy Ivamy (2nd ed.) at pages 496, 497:

"Different considerations apply where the proposal, as filled up by the agent, contains no false statements, but the insurers seek to avoid the policy on the ground that some further fact ought to have been disclosed. In this case, the basis of the contract, so far as it rests upon the proposal, is not affected. If the fact has been disclosed to the agent by the proposed assured, or has otherwise come to the agent's knowledge in the course of his employment, there does not seem to be any valid reason why the agent's knowledge should not be imputed to the insurers. Though the agent, in filling up the proposal, may go outside the scope of his authority and become for that purpose the agent of the proposed assured, he remains for all the purposes of his employment the agent of the insurers. The proposed assured is entitled to assume that the agent knows what ought to be stated and what may be omitted, and it is submitted that the proposed assured is not responsible for the agent's failure to pass on the information to the insurers, notwithstanding the fact that the proposal has been filled up by the agent.

Thus, if the proposal omits to state the fact that the proposed assured has only one eye, or carries on another business as well as the business described in the proposal, knowledge of the fact is to be imputed to the insurers, provided that the proposed assured is not personally responsible for any breach of the duty of disclosure and the omission to state it is solely the fault of the agent."

It is to be observed that every case must turn on its special facts. The facts in the present case are clearly not similar to the facts in *Bawden's* case or *Stone's* case. In *Stone's* case the insurance agent inserted the answer out of his own head. That distinguishes it from *Newsholme's* case where the agent had no authority to fill in the proposal form and was merely the amanuensis of the proposer. *Stone's* case is more like *Bawden's* case where Bawden was an illiterate man who had lost one eye and the agent filled in the proposal form and put it before Bawden for his signature. That, in my opinion, is sufficient reason for saying that the case we are concerned with is also distinguishable from *Bawden's* case. In *Stone's* case the erroneous answers were brought about by the fault of the insurance company's own agent, acting in his capacity as such, so that the company could not treat Mrs. Stone's non-disclosure as material. I must therefore hold that the decision in *Stone's* case cannot apply to the present case.

As regards the passage cited by Mr. Davidson from *Ivamy* on General Principles of Insurance Law, I am constrained to say, with respect to the learned author, that it is not supported by any judicial authority other than *Bawden's* case which, as I have already indicated, is distinguishable from this case, and the case of *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.*[7] In the latter case the agent obtained the sanction of the chief clerk of the insurance company's branch office for the district to alter the policy by inserting the words "and builder" after the word "joiner" as the description of the insured. I think that is sufficient to distinguish the present case from that case.

As pointed out by the learned judge in the court below, the non-disclosure in the present case about the grinding machines was material. I do not see therefore how it can be said that the basis of the contract, so far as it rested upon the proposal, was not effective. I understand the evidence of the branch secretary to the company to mean not that the premium would have been higher if the grinding machines as well had been insured, but that the premium would have been higher because of the greater risk of fire by reason of the presence of the grinding machines on the premises. It was never the plaintiff's case that as the grinding machines were not intended to be insured their non-disclosure in the proposal form was not material. Indeed, this point was not taken and argued before us or in either of the courts below. Moreover, it was decided by this court in *China Insurance Co. Ltd.* v. *Ngau Ah Kau*[8] that once the truth of the answers has been made a condition of the policy it is not open to the court to consider the question whether the answers are material or not.

I would therefore dismiss the appeal with costs. As regards the cross-appeal on the question of costs, I think the learned judge made a mistake in awarding costs to the appellant when his appeal was only partially successful. I would therefore set aside that part of his order and substitute in its place an order that the order as to costs in the Sessions Court do stand but that there be no order as to the costs of appeal in the court below.

Ong Hock Sim F.J. (read by **Gill F.J.**): I have had the advantage of reading the judgment in draft of Gill F.J. With respect, I differ from his conclusions.

The appellant, tenant of a double-storeyed shop-house, No. 61, Fair Park Road, Ipoh carries on business in sundry goods in the front portion of the premises and operates a subsidiary business with four grinding machines at the back portion, one for grinding flour, one for breaking up curry stuff into coarse particles and two for grinding curry stuff into fine powder. These machines are examined and certified by the Inspector of Machinery and are electrically operated. An agent of the respondent company, one Nalliah, invited the appellant to take out a policy. A proposal form (page 56 of Appeal Record) was prepared by the said Nalliah and signed by the appellant on July 20, 1968. It was a "Proposal for Insurance against Fire". Question 3 in that form was as follows:

"For what purposes are the premises occupied? (e.g. dwelling, shop, godown, etc.). If variously tenanted please state the trades or businesses carried on therein."

The answer thereto was "Sundry shop downstairs, dwelling first floor." The appellant signed a declaration in the form in the following terms:

"I/We hereby declare that the particulars of this proposal are true, and I/We agree that this proposal shall be the basis of the contract between myself/ourselves and THE NATIONAL FIRE & GENERAL INSURANCE COMPANY LIMITED, and I/We are willing to accept a policy subject to the terms, clauses and conditions prescribed by the company therein."

He paid premium for, and was issued, Policy No. 271171/68 for period July 20, 1968 to July 20, 1969, renewed the following year by Policy No. 271378/69 for period July 20, 1969 to July 20, 1970. Clause 1 of the policy reads:

"If there be any material misdescription of any of the property by insured, or of any building or place in which such property is contained, *or any misrepresentation as to any fact material to be known for estimating the risk*, or any omission to state such fact, the company shall not be liable upon this policy so far as it relates to property affected by any such misdescription, misrepresentation or omission."

On May 10, 1970 at about 8 p.m. a fire broke out in the front part of the ground floor, resulting in damage to appellant's stock-in-trade, furniture and fittings. *The respondents denied liability on the ground that in the answer to question 3, the appellant failed to disclose the presence of the flour mill at the rear portion of the shop.* It is not in dispute that the fire occurred on a Sunday night at about 8 p.m. when the shop was closed and the machines were not operating and was due presumably to a short-circuit in the sundry goods side of the shop or that there was any damage to the machines.

It is convenient here to look again at the proposal form. The appellant specified under the heading "Property to be insured" three items he desired to insure namely (1) Business Furniture and Fittings (2) Personal Effects and (3) Stock-in-trade for $2,000, $3,000 and $15,000 respectively. It will be noted that the insurance taken out was not for a sundry shop only and in this respect the evidence of the branch secretary to the effect that the "rate of premium for sundry shop is 30 cents for $100. This is shown in proposal form. For a grinding mill is .75 per $100" was not correct. It is crystal clear that this evidence related to *premia* for the different categories appearing in the form for which insurance is sought. There was an item headed "Machinery and Utensils" in the form under which the grinding mill could perhaps be classified. Paying .75 cents for insuring the mill would not insure the property the appellant wanted insurance for. That this evidence misled the learned Special President is apparent when he said in his judgment: "According to the Branch Secretary of the Defendant company, if the existence of these grinding machines on the ground floor of the premises had been disclosed in the Proposal, *the risk*, if accepted by the company, *would have attracted premium* at the rate of .75 per $100 and not at .30 per $100 as was the rate charged under the present Fire Policy." This misconception was also in the mind of the High Court judge on appeal when he said: "In my view in the written answer to question No. 3 there is an omission to state a fact material to be known for estimating the risk, namely, the fact of the existence of the grinding machines on the ground floor of the premises. In my view this is a fact material to be known for estimating the risk, because as found by the learned president, if the existence of the grinding machines on the ground floor of the premises had been disclosed, *the risk would have attracted premium at the rate of 75 cents per $100* of the insured sum instead of 30 cents per $100 as was actually charged."

Question 3 enjoins the assured to state other trades or businesses carried on the premises *"if variously tenanted"*. There is incontrovertible evidence that appellant was sole tenant [See page 16: "Mill business and sundry shop business was registered under one name."] The Schedule to the policy referred to No. 61, Fair Park Road, Ipoh *"occupied as Sundry Shop and Dwelling"*. I do not think it can be said that the presence of the grinding machines changed the character of the premises from sundry shop to grinding mill.

As I mentioned earlier, the four machines were operated as a subsidiary business and part and parcel of the sundry shop business.

The grounds of appeal urged before us were the same as in the High Court and before the Special Sessions President. I find myself, like the learned judge, unable to appreciate the fine distinction between an untrue or false answer in a proposal form and an incomplete answer or non-disclosure, even where the non-disclosure is of a material fact (Ground 1 of the Appeal) nor do I see how a finding by the judge that it fell within the second category takes the appellant's case any further. This argument failed in *Condogianis* v. *Guardian Assurance Co.*[9] where Lord Shaw of Dunfermline said:

"In the pleadings the defence was rested on a variety of grounds. At their Lordships' bar the learned counsel for the respondents stated that it was sufficient to rely upon one of these grounds, and that all the others might be taken as discarded. *This ground was that two statements made in the*

proposal were untrue. One of these statements stood opposite the following, being a request for the 'name in full, residence and occupation, of the person in whose name the policy is to be made out.' The appellant, Nicholas Condogianis, signed his name and gave his address. There was, however, a printed note attached and clearly made a condition of the policy, to the following effect: *'If not the owner, the nature of interest must be stated.'* The truth was that the appellant, prior to the date of the policy, had entered into a contract of partnership with one Mrs. Rachor. The deed of partnership is produced, and it appears from it that the partners are equally entitled to the profits of the concern. It further appears, however, that *Mrs. Rachor's contribution to the firm's capital was of a very slender amount, and on this and other grounds the appellant maintained that his representation,* which amounted to an assertion of his own ownership, *was substantially true.* Whether such a contention could be successfully maintained or not their Lordships do not propose to determine, as they have formed a clear conclusion upon the other ground now to be mentioned, which formed the staple part of the argument before the Board, as also of the judgments of the learned judges of the court below.

That ground is this: *Among the questions in the appellant's fire insurance proposal to the respondents was the following: 'Has proponent ever been a claimant* on a fire insurance company in respect of the property now proposed or any other property? If so, state when and name of company.' To this the answer was given: 'Yes. 1917. 'Ocean.''

This answer was in a literal sense true — that is to say, it was true that the proposer had in the year 1917 made a claim against the Ocean Insurance Co. in respect of the burning of a motor-car. *He omitted, however, to state what was also the fact* — namely, that in the year 1912 he had made another claim against the Liverpool and London and Globe Co. in respect of the burning of a motor-car owned by him. He was paid the sum of 267*l.* 3s. in settlement of that claim.

It is unnecessary to state that the answer given by the appellant in the proposal falls clearly within the express declaration which is now to be quoted. The terms of that declaration are as follows: 'This proposal is the basis of the contract and is to be taken as part of the policy and (if accepted) the particulars are to be deemed express and continuing warranties furnished by or on behalf of the proponent; and any questions remaining unanswered will be deemed to be replied to in the negative. The proposal is made subject to the company's conditions as printed and/or written in the policy to be issued hereon, and which are hereby accepted by the proponent'."

These terms, it will be apparent, are couched, I would say, in more definite terms than those herein, which I have already quoted. As His Lordship said:

"The case accordingly is one of express warranty. If in point of fact the answer is untrue, the warranty still holds, notwithstanding that the untruth might have arisen inadvertently and without any kind of fraud. Secondly, the materiality of the untruth is not in issue; the parties having settled for themselves — by making the fact the basis of the contract, *and giving a warranty* — that as between them their agreement on that subject precluded all inquiry into the issue of materiality. In the language of Lord Eldon in *Newcastle Fire Insurance Co.* v. *Macmorran* ((1815) 3 Dow 255, 262). 'It is a first principle in the law of insurance, on all occasions, *that where a representation is material* it must be complied with — if immaterial, that immateriality may be inquired into and shown; *but that if there is a warranty* it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing'."

I need only quote from another part of His Lordship's judgment (page 131):

"With these matters in view, *what is a just and reasonable construction of the words in the question,* 'Has proponent ever been a claimant on a fire insurance company'?

It is not to be wondered at that this was made the basis of the contract, because insurance companies might hesitate long before entering into a contract with an insurer who had been formerly a claimant upon companies, and they would have been put upon their inquiry as to what these claims were and how they had been settled and what were the circumstances of these former transactions. The importance of the question might be increased by the number of times in which such transactions had taken place. The argument of the appellant, however, was that it was sufficient to answer the question, 'Has proponent ever been a claimant....? If so, state when and name of company'? by answering in the singular and giving one occasion and one occasion alone. Accordingly, if, say, several years ago a proponent had been a claimant under an insurance policy, it would be sufficient for him to mention that fact and to exclude from mention the further fact that every year since that occasion he had also been a claimant upon insurance companies for fire losses. *It appears to their Lordships quite plain that this would be no good answer* to the question, 'Has proponent ever been a claimant? If so, state when'? In short, *when that question is reasonably construed,* it points to the insurer getting the benefit of what has been the record of the insured with regard to insurance claims. *This was distinctly its intention* and in their *Lordships' opinion is plainly its meaning.* To exclude, however, from that record what might in the easily supposed case be all its most important items, however numerous these might be, and to answer the question in the singular, which again in the easily supposed case might be a colourless instance favourable to the claimant, would be to answer the question so as to misrepresent the true facts and situation and to be of the nature of a trap."

Other grounds of appeal urged on the question of waiver and agency and imputation of knowledge of Nalliah to the respondent were equally without merit or substance.

I am much taken up however with what His Lordship has to say again in the *Condogianis* case (page 130). I now quote:

"The more serious proposition arose on the construction of the question and answer. In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that *if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against which the insured would be protected by courts of law."*

Taking that view, I would say that in the instant case, *the answer is, in my opinion, unimpeachable on any reasonable construction.* It would have been otherwise, as in the *Condogianis* case, if he had given untrue or half-true answers to questions 7, 8, 9 and 10 of the proposal form, which can clearly be seen to relate to matters affecting the risks to be insured or for determining whether the insurers would accept the proposal. There is not, in my view, any question here that the respondent company has been misled as to the nature of the insurance the appellant wished to take out *and in respect of what goods.* There is no evidence on record in what way the presence of the grinding mills is considered to appear to increase the risks with respect to the property insured. I have yet to come across a more callous and unconscionable attempt to evade their contractual obligations as the respondents have shown in this appeal.

I would allow the appeal and award costs here, in the High Court and Sessions Court. The sum of $3,144.19 estimated damages by MACO was apparently agreed and accepted by the respondents. In the event, there will be judgment for this sum with interest at 6% from August 2, 1971.

The deposit will be refunded to appellant.

Appeal allowed.

Solicitors: *Lewis & Co.; H. R. Sankey & Co.*